State of Michigan
In the Supreme Court
Appeal from the Michigan Court of Appeal

Theresa O'Day DeRose (aka Theresa Seymour)
Plaintiff/ Third Party Defendant-Appellee,
v.

Joseph Allen DeRose,
Defendant-Appellee,
v.

Catherine DeRose,

Third Party Plaintiff-Appellant

Supreme Ct. 121246
Ct. of Appeals. 232780
Trial Court. 97-734836-DM

This Appeal Involves a Ruling that a Provision of The Constitution, a Statute Rule or Regulation or Other State Governmental Action is Invalid

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Amicus Curiae Brief for the Michigan Coalition Against Domestic and Sexual Violence In Support of Appellee Theresa (Derose) Seymour

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STATEMENT OF QUESTIONS PRESENTED

I. Must There Be a Finding of Harm or Unfitness as the Compelling State Interest Justifying State Intervention in Parental Associational Decisions; and Does Simply Applying a Best Interests Comparative Test Result in the Improper Substitution of Judgment by the State for the Decision of a Fit Parent?

Appellant answered "No."
Amicus answers "Yes."

II. Is the Effect of Michigan's Grandparenting Statute the Same as the Statute Condemned in *Troxel* – Providing No Objective Guidance and Allowing the State to Insert its Judgment as to What Is "Better" Based on a "Free-ranging" Best Interests Test, and therefore Unconstitutional?

Appellant answered "No."
Amicus answers "Yes."

III. Does Third Party Intervention Create Fundamental Burdens on All Fit Parents and Their Children, and, furthermore: (1) Disproportionately impact low-income and single-parent households, which are predominently headed by women, and (2) Create fundamental burdens on parents and children surviving domestic violence?

Appellant would answer "No."
Amicus answers "Yes."

Basis of Jurisdiction of the Supreme Court

The Supreme Court has accepted jurisdiction of this case and invited amicus briefs.

Statement of Interest

The Michigan Coalition Against Domestic and Sexual Violence (MCADSV) is a nonprofit organization incorporated in the State of Michigan since 1978. MCADSV advocates for victims of domestic and sexual violence, including children, and the programs that serve them. MCADSV has a long history of providing extensive training and technical assistance to a variety of organizations and individuals across the state including the courts, police, prosecutors, medical professionals, and educators. MCADSV provides support, informational, and educational services, including public policy advocacy. MCADSV staff have been called upon to serve as faculty for the Michigan Judicial Institute and to serve on the editorial advisory committee of the MJI Bench Book and other publications.

MCADSV is deeply concerned about the safety of survivors of domestic violence and their minor children as they seek to secure their safety away from the perpetrator of the violence. In many cases, the relatives of the assailant will assist in continued efforts to exert control over the survivor and the children, often through protracted custody and visitation disputes. The interest of MCADSV in this case is to seek to limit the intervention of third persons seeking child custody or visitation, particularly where domestic violence is concerned.

Kathleen Hagenian, Director, Public Policy and Program Services

Statement of Facts

Appellee Theresa Seymour and Defendant Joseph Derose were married and are the parents of one child, a daughter Shaun Ashley Derose, born April 1, 1996. Ms. Seymour has two other daughters from a previous marriage. Ms. Seymour filed for divorce after Defendant admitted to sexually abusing her oldest daughter, Julia, who was 12 at the time. Defendant was charged with multiple counts of first-degree criminal sexual conduct. In December 1997, Defendant pled guilty and was sentenced to 12 to 20 years in prison. (May 27, 2000 Hearing Transcript, p. 4). If paroled, Defendant is to have no contact with any minor children.

On May 14, 1998, a Default Judgment of Divorce was entered. Ms. Seymour was awarded sole legal and physical custody of Shaun. Defendant was barred from any visitation with the minor child. (Default Judgment, p. 2).

Appellant Catherine Derose, the paternal grandmother, filed a *pro per* petition for visitation, apparently prior to entry of the default judgment. However, there is no indication of any such motion on the lower court docket sheet. During the Friend of the Court investigation concerning the request, Appellant stated that she had had no contact with the minor child since she was a year old, she wanted as much time as she could get, and that she did not believe her son had molested the older child. She did not have a relationship with Ms. Seymour. She also believed that a neighbor had molested her son and that her husband had never told her. The Friend of the Court concluded that Appellant did not have standing to seek grandparent visitation and recommended she seek counsel. (Family Counseling and Mediation Report, Oct. 26, 1998).

Appellant subsequently retained counsel who filed a visitation petition in March 1999, and a new Friend of the Court investigation was ordered. In a written report, the Friend of the

Court recommended supervised visitation on alternate Saturdays from noon to 2 pm for eight months, with increasing time after the ninth month. (February 24, 2000 Recommendation).

Ms. Seymour filed objections. The trial court held a brief hearing on May 25, 2000 (with no testimony), stating:

> "... it doesn't strike me that there is any reason here that a child should be deprived of a grandmother. Grandmothers are very important. Grandmothers are very important. [sic] I don't say that just because I am one, but I do believe they are important. I have a niece who doesn't have any and she borrows grandparents and I realize that this is... a very difficult time for the 12-year-old [victim/half-sister], but the 12 year-old is not going to be required to see this lady. Not that is [sic] necessarily would be terrible, but I'm not saying it would be good.

The trial court adopted the Friend of the Court recommendation in an order dated June 12, 2000.

The trial court never conducted an evidentiary hearing and made no findings under the best interest factors.

The trial court subsequently denied Ms. Seymour's motion for reconsideration and her motion for stay. The court granted Appellant's motion to enforce the visitation. Ms. Seymour appealed.

On appeal, the Court of Appeals found Michigan's grandparenting time statute, MCL 722.27b facially unconstitutional under Troxel v Granville, 530 US 57 (2000) in that it permits the state to override the decisions of fit parents and to simply substitute a judgment it deems "better" based only on a best interests test. The Court found that the Michigan statute lacks any objective guidance, resulting in the same "simple disagreement" between the court and a parent found constitutionally inadequate in Troxel.

This Court granted leave to appeal.

ARGUMENT

I. THERE MUST BE A FINDING OF HARM OR UNFITNESS AS THE COMPELLING STATE INTEREST JUSTIFYING STATE INTERVENTION IN PARENTAL ASSOCIATIONAL DECISIONS; SIMPLY APPLYING A BEST INTERESTS COMPARATIVE TEST RESULTS IN THE IMPROPER SUBSTITUTION OF JUDGMENT BY THE STATE FOR THE DECISION OF A FIT PARENT.

In Troxel v Granville, 530 US 57, 120 S.Ct. 2054 (2000), the United States Supreme Court declared that parents have "perhaps the oldest of the fundamental liberty interests recognized by this Court," i.e. the right to determine the care, custody, and control (including the associations) of their children. 530 US at 65.

Children share in this due process liberty interest with their parents. In In re Clausen, 442 Mich 648, 502 NW2d 649 (1993), this Court specifically recognized the "mutual due process liberty interest" between natural parent[1] and child, stating:

> The ***mutual*** rights of the parent and child come into conflict only when there is a showing of parental unfitness. *As we have held in a series of cases, the natural parent's right to custody is not to be disturbed absent such a showing*, sometimes despite the preferences of the child. Clausen at 687; fn. 46 (Emphasis added).

"While a child has a constitutionally protected interest in family life, that interest is not independent of its parents' in the absence of a showing that the parents are unfit." Clausen at 657.

Troxel articulates the Constitutional tenet that fit parents are presumed to know what is best for their own children and are in the best position to make decisions which promote and protect their children's interests free from State intrusion.[2] Id, at 68. Historically, the primary

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[1]. Adoptive parents likewise have a Constitutionally protected relationship. Third persons are any individuals other than parents. See MCL 722.22(g).

[2] The law presumes that parents possess what a child lacks in maturity, experience, and capacity for judgment required for making life's difficult decisions. More important, the law historically has

protection of the parent-child liberty interest is that parent custody, including decision making, may not be disturbed absent a showing that the parent is unfit. See Parham v JR, 442 US 584 (1979); Stanley v Illinois, 405 US 645, 651 (1972).[3]

The underlying message of Troxel is that if parents are capable (i.e. fit) to make decisions concerning the rearing of their children, they, not the State, make the decision about grandparent or third-person association.

Both Troxel and Clausen specifically recognize that third persons (including grandparents) have no inherent rights to visitation with children (and conversely, children have no inherent rights to visitation with grandparents). See Clausen, supra at 654-655 (citing Smith v Organization of Foster Families, and distinguishing natural parent-child relationships from nonparental relationships with children).

This Court in Frame v Nehls, 452 Mich 171 (1996) likewise denied a grandparent equal protection claim on the basis that grandparents are not a protected class and grandparent

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recognized the natural bonds of affection and relation that lead parents to act in the best interests of their children.

[3] In Stanley, the Court reversed and remanded a decision where a parent was denied custody pursuant to an Illinois Dependency Statute where there was no finding of parental unfitness. There, an unwed father's access to his children was severely limited under an Illinois dependency statute due to the death of the children's mother; the father was left with only the opportunity to act as a guardian for his own children. There was no finding of parental unfitness, and the case was not a parental termination proceeding. The Court found that the dependency statute "empowers state officials to circumvent neglect proceedings." Stanley, 405 US at 649. Under the Illinois Neglect Statute, the father would have been entitled to an array of procedural protections, including a fitness determination, while under the Dependency Statute, he experienced no such protections. The Court reversed the Illinois Court and remanded the case for additional procedures consistent with the Due Process and Equal Protection Clauses. The Court further held that the constitutional protections were not satisfied by the suggestion that the father could have regained custody through adoption or guardianship proceedings. The Court, in finding due process and equal protection violations, stated that "such restricted custody and control" of children pursuant to a guardianship statute was not full parenthood and constituted a violation of the parent-child relationship. 405 US at 648-649.

visitation is not a protected interest. See also Victor, Robbins & Bassett, Statutory Review of Third-Party Rights Regarding Custody, Visitation and Support, Family Law Quarterly, No. 1, Spring 1991, p. 19 (noting there are no inherent rights of third parties to request custody or visitation of another person's child; third party intrusions fly "directly in the face of constitutionally protected rights of parents to associate with and raise their children.").

Any rights grandparents or other third persons have are legislatively created. These legislative creations cannot trump the mutual liberty, privacy, and associational interests between parent and child in the absence of a compelling state interest. M.L.B. v. S.L.J., 519 U.S. 102, 116 (1996)(discussing parental choices and right of association, citing Boddie, 401 U.S. 371 (1970)); Lulay v Lulay, 739 NE2d 521 (Ill, 2000)(primary importance of parental right to determine association).

Because a fundamental right (i.e. custody and control of one's child) is involved, a strict scrutiny test is applicable. 530 US at 80 (Concurring Opinion of Justice Thomas). The "Fourteenth Amendment forbids the government to infringe ... 'fundamental' liberty interests at all, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest." Washington v. Glucksberg, 521 US 702, 721; 117 S Ct 2258 (1997). Cf. Frame v Nehl, (grandparent visitation not a fundamental right and does not involve suspect classifications, strict scrutiny not applicable). See Manistee Bank & Trust Co. v McGowan, 394 Mich 655, 668, 232 NW2d 636 (1975)("rarely have courts sustained [rules] subjected to this standard of review").

Appellant attempts to raise grandparents' claims to visitation to the level of a compelling state interest. This is simply a backdoor, unsupportable attempt to make generalized and idealized notions of grandparent relationships into a fundamental right. *See* Lulay v. Lulay, *supra,* 739 N.E.2d 521 (2000) (Illinois Supreme Court held that a generalized belief that children should

spend time with grandparents did not serve a compelling state interest). In cases involving interference with the parent-child liberty interest, the compelling interest of the state is protection of a child from harm. An unfitness standard is the application of this compelling state interest. See Parham, supra; Clausen, supra.

Troxel found unconstitutional a grandparent visitation award based on the judge's determination under a best interests of the child standard contained in Washington's nonparental visitation statute. 530 US at 57. "First, the Troxels did not allege, and **no court has found, that Granville was an unfit parent**. That aspect of the case is important, for there is a presumption **that fit parents act in the best interests of their children**." Id., 530 US at 68 (citing Parham, supra).

The application of a best interest test allowed the trial court to impermissibly substitute its judgment as to what it thought was the "better" decision than a fit parent, without any deference to parental decision making. See Issue I.2, *infra*.

1. Analysis of Troxel v Granville

Contrary to Appellant's claim, Troxel did not find any grandparent or third-party visitation statute constitutional; no other statute from Michigan or any other state was before the Court. These statutes are susceptible to constitutional scrutiny on the basis that they may "contravene the traditional presumption that a fit parent will act in the best interest of his or her child." Savage, David, "Parents First" ABA Journal, August 2000, p. 38, quoting Troxel. As Justice O'Conner wrote for the majority:

> The extension of statutory rights in this area to persons other than a child's parents, however, comes with an obvious cost. For example, the State's recognition of an independent third-party interest in a child can place a substantial burden on the traditional parent-child relationship. ..[O]ur terminology is intended to highlight the fact that these statutes can present questions of constitutional import.

The constitutionality of any statutory standard for awarding visitation turns on the specific manner in which that standard is applied and that the constitutional protections in this area are best "elaborated with care." 530 US at 73.

Troxel does not supply specific criteria to determine the constitutionality of third person visitation statutes. The Court does, however, state the basic premise that it is impermissible for the State to substitute its judgment for that of fit parents simply because it deems its decision "better." 530 US at 73. The Court also acknowledges the primary constitutional question: whether the Due Process Clause requires all nonparental visitation statutes to "to include a showing of harm or potential harm to the child as a condition precedent to granting visitation." *Id.* The Court, however, was able to invalidate the visitation award based on the sweeping breadth of the Washington statute, focusing on the lack of any substantive guidance or standard for interfering in parental decisions.

In Troxel, the Washington statute allowed trial courts to award visitation to any person, regardless of whether there is a pending custody action, whenever it may serve the "best interest of the child."

> First, according to the Washington Supreme Court, the Constitution permits a State to interfere with the right of parents to rear their children only to prevent harm or potential harm to a child. Section 26.10.160(3) fails that standard because it requires no threshold showing of harm. [Citation omitted]. Second, by allowing "'any person' to petition for forced visitation of a child at 'any time' with only the requirement being that the visitation serve the best interest of the child," the Washington statute sweeps too broadly. [Citation omitted]. "It is not within the province of the state to make significant decisions concerning the custody of children merely because it could make a "better" decision." Troxel, 530 US at 62-63 (discussing Washington Supreme Court decision)(Emphasis added).

The Washington Supreme Court found that parents have a right to limit their children's contact with third parties, and that between parents and judges, it is the parents who have the

right to make these decisions. That court found the state's third-party visitation statute unconstitutional on its face.

The United States Supreme Court likewise focused on the role of the state in substituting its judgment for that of fit parents and on the inappropriateness of employing the best interest standard:

> "[S]o long as a parent adequately cares for his or her children (i.e. is fit) there will normally be no reason for the State to inject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent's children." Majority Opinion, O'Conner,530 US at 68-69.
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> "The [trial] judge's comments suggest that he presumed the grandparents' request should be granted unless the children would be "impact[ed] adversely." In effect, the judge placed on Granville, the fit custodial parent, the burden of disproving that visitation would be in the best interest of her daughters. The judge reiterated moments later: "I think [visitation with the Troxels] would be in the best interest of the children and I haven't been shown it is not in [the] best interest of the children.
>
> The decisional framework employed by the Superior Court directly contravened the traditional presumption that a fit parent will act in the best interest of his or her child ..." Majority Opinion, O'Conner, J., 530 US at 69-70. (Emphasis added).

Troxel concluded that the case was nothing more than a disagreement between the trial court and the mother over her children's best interests. The Court found the statute violated Granville's fundamental due process right to make decisions concerning the rearing of her own daughters based on its grant of "broad, unlimited power " to the trial court to substitute its judgment for that of fit parents determined only by what it considers is in the best interest of the children. Id. at 70-73.

Justice Souter, in his concurring opinion, reiterated that the Washington statute allows any third person to receive visitation "subject only to a free-ranging best-interests-of a child

standard" and would have found the statute facially unconstitutional[4]. 530 US at 76-78. Justice Thomas would find the statute facially unconstitutional, bar the states from "second-guessing a fit parent's decision regarding visitation with third parties" and would apply strict scrutiny requiring a compelling state interest to all such statutes implicating parental rights. Id. at 80.

> I would apply strict scrutiny to infringements of fundamental rights. Here, the State of Washington lacks even a legitimate governmental interest--to say nothing of a compelling one--in second-guessing a fit parent's decision regarding visitation with third parties. On this basis, I would affirm the judgment below.

Appellant's basic position is that this Court adopt and apply the dissents of Troxel to the Michigan statute. That position is legally untenable. A court cannot ignore the majority decision of the highest court of this nation in favor of dissenting opinions that did not garner any concurrence by other justices. Furthermore, the opinions of the dissenting justices also recognize the parental right of care and control of children. As for the three dissenters, Justice Scalia stated

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[4]. " I see no error in the second reason, that because the state statute authorizes any person at any time to request (and a judge to award) visitation rights, subject only to the State's particular best-interests standard, the state statute sweeps too broadly and is unconstitutional on its face. Consequently, there is no need to decide whether harm is required or to consider the precise scope of the parent's right or its necessary protections." 530 US at 76-77.

"Whether for good or for ill, adults not only influence but may indoctrinate children, and a choice about a child's social companions is not essentially different from the designation of the adults who will influence the child in school. Even a State's considered judgment about the preferable political and religious character of schoolteachers is not entitled to prevail over a parent's choice of private school. Pierce [v Society of Sisters], *supra,* at 535, 45 S.Ct. 571 ("The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations"). It would be anomalous, then, to subject a parent to any individual judge's choice of a child's associates from out of the general population merely because the judge might think himself more enlightened than the child's parent. [FN4] To say the least (and as the Court implied in Pierce), parental choice in such matters is not merely a default rule in the absence of either governmental choice or the government's designation of an official with the power to choose for whatever reason and in whatever circumstances." Id. at 78-79.

that parental rights should control[5], however, he felt that the Constitution did not give the Court authorization to strike down the state law. Justice Kennedy stated that custodial parents have constitutional rights to determine how to raise their children without undue influence from the state, however, parents do not have absolute veto power. Justice Stevens was the only justice to fully favor the third persons/grandparents.

The Troxel majority firmly recognized the fundamental liberty interest parents have in the care, custody and control of their children and condemned the inappropriate substitution of state judgment.

2. Best Interest Standard Amounts to Impermissible Substitution of Judgment

The crux of Troxel is not who has the burden of proof, but the substantive standard used to determine when the State can intervene and superimpose its own decision:

> First, the Troxels did not allege, and no court has found, that Granville was an unfit parent. That aspect of the case is important, *for there is a presumption that fit parents act in the best interests of their children.*" (Emphasis added). 530 US at 68.

Troxel found that the Washington trial court's order was not founded on any special factors that might justify the State's interference with Granville's fundamental right to make decisions concerning the rearing of her two daughters. 530 US at 68. A best interests test inherently amounts to an impermissible substitution of judgment by the state violating due process *per se.*

The law of domestic relations treats as distinct the two standards, one harm to the child and the other the best interests of the child. 530 US at 96 (Kennedy, J). In Parham v J.R., 442

[5] "In my view, a right of parents to direct the upbringing of their children is among the "unalienable Rights" with which the Declaration of Independence proclaims "all men ... are endowed by their Creator." And in my view that right is also among the "othe[r] [rights] retained by the people" which the Ninth Amendment says the Constitution's enumeration of rights "shall not be construed to deny or disparage." Id. at 91-92.

US 584 (1979), counsel for a child sought to argue that the child had a competing liberty interest (in the child's admission to a mental health care facility) which needed to be balanced against that of the natural parents. The Court, recognizing the long-standing presumption that parents act in the best interests of their child, rejected this argument, concluding "that our precedents permit the parents to retain a substantial, if not the dominant, role in that decision, absent a finding of neglect or abuse ... " Id. at 604. (emphasis added).

> If a State were to attempt to force the breakup of a natural family over the objections of the parents and their children without some showing of unfitness and for the sole reason that to do so was thought to be in the children's best interest, I should have little doubt that the State would have intruded impermissibly on "the private realm of family life which the State cannot enter." Smith v OFFER, supra, 431 US at 863, citing Prince v Commonwealth of Massachusetts, 321 US 158, 166 (1944).

See also Meyer v Nebraska, 262 US 390, 399-400 (1923)(child rearing "central part" of liberty protected by due process clause); Pierce v Society of Sisters, 268 US 510, 534-535 (1925); Wisconsin v Yoder, 406 U.S. at 230(the State may exercise its parens patriae power only when there is harm or threat of harm to the child).

This Court in Clausen, *supra,* discussed a long line of custody cases where the rights of natural parents were not disturbed in the absence of findings of unfitness, sometimes despite the preferences of the child. Id. at 687, citing Burkhardt v Burkhardt, 286 Mich 526, 282 NW 231 (1938); Liebert v Derse, 309 Mich 495, 15 NW2d 720 (1944); Riemersma v Riemersma, 311 Mich 452, 18 NW2d 891 (1945); Herbstman v Shiftan, 363 Mich 64, 108 NW2d 869 (1961). Clausen, supra, at 681-682. See also In re RFF, Supreme Court Slip Opinion #117542, 117555, Oct. 24, 2000 (Justice Corrigan, dissenting, citing Troxel and stating "the Washington statute did not require a finding that the parents were unfit before the judge awarded visitation to a third

party. This scheme contravened the constitutional presumption that fit parents act in the best interests of their children").

The "free-ranging" best interest test criticized by Justice Souter ignores the fundamental issue of whether parents are unfit or incapable of making decisions that are best for their children and does not address the specific relationship between parent and child. It instead provides broad scope for a judge to supercede a parental decision based on subjective comparison and insert his or her own view as to what is best:

> "As we have explained, the due process clause does not permit a State to infringe on the fundamental right of parents to make child-rearing decisions simply because a state judge believes a "better" decision could be made." Troxel, Majority, 120 S.Ct. at 2064.

A comparative best interest test has historically been used in divorce proceedings between competing parents who have the same Constitutional rights with respect to each other. MCL 722.25. However, a court's authority to decide between parents, who both have inherent Constitutional rights to custody and visitation, does not extend to granting visitation to third parties, who have no such rights. Because they are designed to be applied to parents, the parties (and children's) Constitutional rights are not addressed. A more objective fitness test focuses on the relationship between parent and child (and the appropriateness of a parent making decisions for a child) and is not a comparison with other proposed custodians or intervenors.

Appellant argues that the best interest factors are detailed and comprehensive and provide clear guidance for a court. However, the best interest factors are in actuality a list of broad areas of comparison, including an assessment of emotional ties, and morality. MCL 722.23.

> The best interests of the child is a highly contingent social construction. Although we often pretend otherwise, it seems clear that our judgments about what is best for our children are as much the result of political and social judgments about what kind of society we prefer as they are conclusions based upon neutral or scientific data about what is "best" for children. The resolution of conflicts over

> children ultimately is less a matter of objective fact-finding than it is a matter of deciding what kind of children and families, what kind of relationships – we want to have." Weaver-Catalana, Bernadette "The Battle for Baby Jessica: A Conflict of Best Interests," 43 Buffalo Law Review 583 (Fall 1995)(emphasis added).

Wide discretion under the best interest factors raises the specter of cultural, class, life-style and other types of bias and prejudice and ultimately results in the very substitution of judgment condemned in Troxel.

Fitness determinations also incorporate the subjective, but to a lesser degree than a comparative test. Given the fundamental nature of parental rights, a valid state grandparent visitation statute must furnish the judge applying it with sufficient **objective** criteria to make determinations whether there should be state interference into a parent's decision making, based on facts and compelling interest, not idiosyncratic choices based on undefined amorphous standards. See Herbst v Swan, Court of Appeal, California, Second Appellate District, Division Four, October 3, 2002 Cal. App. LEXIS 4736(visitation statute unconstitutionally applied).

As stated in Troxel, the Constitutional presumption is that fit parents make decisions that are in the best interest of their children. Best interest tests do not address this Constitutional tenet (whether a parent is capable of making decisions for their child) and in essence allow state insertion of its judgment as to what is best, offering no deference to parental decision-making.

3. Cases from other Jurisdictions

Appellant's broad statement that the "vast majority" of states have upheld grandparent visitation laws is misleading. The key is not whether statutes have been found constitutional or unconstitutional (whether facially or as applied). The focus is properly on what substantive standard the courts have applied in construing the various statutes. These decisions have

predominantly approached the issue as a question of the applicable substantive standard used to intervene into a family, and not as an issue of standing or burden of proof.[6]

The cases most often find application of a best interests test alone inadequate to protect the fundamental child-parent liberty interest, and require a fitness test or a showing of harm or some extraordinary circumstance before intervention.

In Wickham v. Byrne & Langman v. Langman, 769 NE2d 1 (2002) the Illinois Supreme Court held that the state's grandparental visitation statute was facially unconstitutional by placing a parent on an equal footing with a person seeking visitation under a best interest standard and directly contravening the traditional presumption that a ***parent is fit*** and acts in the best interest of the child. The Illinois statute lists a number of limitations as prerequisites for filing.[7]

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[6] Even other cases that find statutes acceptable under Troxel ostensibly based on specific standing provisions, in reality focus on substantive standards. In Harrington v. Daum, No. CA A108204 (Or. Ct. App. Jan. 31, 2001) the Oregon Court of Appeals found that the Oregon statute focuses on whether there is a parent child relationship between the third-party petitioner and the child, implying that there will be harm if that relationship is severed. In general standing provisions like those in Michigan's statute do not address the underlying issue of the state substituting its judgment for that of fit parents.

Likewise. in State of West Virginia ex rel. Brandon L. and Carol Jo L v Moats, 551 SE2d 674 (W. Va 2001), ostensibly cited by Appellant as supporting his position, the statute in question contains twelve specific statutory criteria relating to grandparent visitation that go beyond the mere best interests of the child. The statutory criteria include, among others, assessing the relationship between the grandparent and child; the effect of the visitation on the parent-child relationship, whether the visitation request was in good faith, and the preference of the parent. The statute also requires that there is no significant interference in the parent-child relationship. This amounts to a more focused standard than Michigan's best-interest factors – which do not directly pertain to third person visitation issues at all. The West Virginia statute falls short of clear harm required before intervention; harm is at least implied by its focus on avoiding interference with the parent child relationship and some of the listed factors. Michigan's factors fall far short of even this standard.

[7] Section 607(b) states, in pertinent part:

"(b)(1) The court may grant reasonable visitation privileges to a grandparent, great-grandparent, or sibling of any minor child upon petition to the court by the grandparents or great-grandparents or on behalf of the sibling, with notice to the parties required to be notified under Section 601 of this Act, if the court determines that it is in the best interests and welfare of the

However, the bottom line is that the statute permits the state to order visitation based on a best interests standard. The court, while noting that Illinois statutes carry a strong presumption of constitutionality, focused on what substantive standard is used as the basis for state interference:

> [The] argument overlooks the clear constitutional directive that state interference should only occur when the health, safety, or welfare of a child is at risk. The issue we address does not involve a threat to the health, safety, or welfare of children. Unlike the statutes concerning inoculation or immunization, sections 607(b)(1) and (b)(3) involve visitation and a parent's decision to control who may interact with his or her children. Additionally, the United States Supreme Court does not limit the fundamental right to make decisions concerning the care, custody, and control of children to decisions made by joint parents: "this Court's decisions have by now made plain beyond the need for multiple citation that a parent's desire for and right to `the companionship, care, custody, and management of his or her children' is an important interest that `undeniably warrants deference and, absent a powerful countervailing interest, protection" (Emphasis added).

The Court concluded that:

> Section 607(b)(1) contains a similar flaw to the statute at issue in Troxel. Section 607(b)(1) permits grandparents, great-grandparents, or the sibling of any minor child visitation *if "the court determines that it is in the best interests and welfare of the child.* ... Like the statute in Troxel, section 607(b)(1), in every case, places the parent on equal footing with the party seeking visitation rights. Further, like the statute in Troxel, section 607(b)(1) directly contravenes the traditional presumption that parents are fit and act in the best interests of their children. The statute allows the "State to infringe on the fundamental right of parents to make child rearing decisions simply because a state judge believes a `better' decision could be made." Troxel, 530 U.S. at 72-73, 147 L.Ed.2d at 61, 120 S.Ct. at 2064. Section 607(b)(1) exposes the decision of a fit parent to the unfettered value judgment of a judge and the intrusive micro-managing of the state. Because we can

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child, and may issue any necessary orders to enforce such visitation privileges. Except as provided in paragraph (2) of this subsection (b), a petition for visitation privileges may be filed under this paragraph (1) * * * if one or more of the following circumstances exist:

(A) the parents are not currently cohabiting on a permanent or an indefinite basis;
(B) one of the parents has been absent from the marital abode for more than one month without the spouse knowing his or her whereabouts;
(C) one of the parents is deceased;
(D) one of the parents joins in the petition with the grandparents, great-grandparents, or sibling; or
(E) a sibling is in State custody.

* * *

(3) When one parent is deceased, the surviving parent shall not interfere with the visitation rights of the grandparents."

> conceive of no set of circumstances under which section 607(b)(1) of the Act would be valid, we hold that it is unconstitutional on its face. For the same reasons, we hold that section 607(b)(3) is facially unconstitutional." (Emphasis added).

The Illinois decision does not rely on allocating burdens of proof or the degree of evidence (such as clear and convincing) as sufficient to protect the fundamental parent-child liberty interest. The court directly equates a "best interests" substantive test with unconstitutional insertion of unfettered value judgments of a trial court. See Schweigert v. Schweigert, 772 N.E.2d 229 (2002)(following Wickham); Lulay v. Lulay, *supra*.

In Brice v. Brice, 754 A.2d 1132 (2000), Maryland's highest court held that Md. Code Ann., Fam. Law 9-102 unconstitutionally violated a mother's due process rights where the grandparents did not allege, and no court had found, that the mother was an unfit parent. The mother merely wished to set visitation on her own terms, without the interference of a judge, under a "best interests of the child" standard. See Seagrave v Price 79 S.W.3d 339 (2000)(finding Arkansas grandparenting statute unconstitutionally applied; "[d]eciding when, under what conditions, and with whom their children may associate is among the most important rights and responsibilities of parents). *See* Roth v. Weston, 789 A.2d 431, 259 Conn. 202 (2002)(Conn. Supreme Court reversed judgment allowing maternal grandmother's and aunt's visitation of father's children, since father was not shown ***unfit***, children were not shown to be harmed by no visitation, and plaintiffs were not parent-like).

The Roth court also equated best interests with inappropriate substitution of judgment, stating "it allows parental rights to be invaded by judges based solely upon the judge's determination that the child's best interests would be better served if the parent exercised his parental authority differently." 259 Conn. at 223.

> The constitutional issue, however, is not whether children should have the benefit of relationships with persons other than their parents or whether a judge considers that a parent is acting capriciously. In light of the compelling interest at stake, the best interests of the child are secondary to the parents' rights. Brooks v. Parkerson, 265 Ga. 189, 194, 454 S.E.2d 769, cert. denied, 516 U.S. 942, 116 S.Ct. 377, 133 L.Ed.2d 301 (1995) (finding it "irrelevant" to constitutional analysis that visitation may be in best interest of child); **Rideout v. Riendeau, supra, 761 A.2d 301 ("something more than the best interest of the child must be at stake in order to establish a compelling state interest")**; In re Herbst, 971 P.2d 395, 399 (Okla. 1998) (noting that court does not reach best interest analysis without showing of harm; absent harm, no compelling interest); Hawk v. Hawk, 855 S.W.2d 573, 579 (Tenn. 1993) (holding that best interest of child is not compelling interest warranting state intervention absent showing of harm). Otherwise, "[the best interest] standard delegates to judges authority to apply their own personal and essentially unreviewable lifestyle preferences to resolving each dispute." Rideout v. Riendeau, supra, 310.
>
> The trial court is not better situated to determine the issue based upon its best judgment. As Troxel instructs, "the Due Process Clause does not permit a State to infringe on the fundamental right of parents to make child rearing decisions simply because a state judge believes a'better' decision could be made." Troxel v. Granville, supra, 530 U.S. 72-73. Because parenting remains a protected fundamental right, the due process clause leaves little room for states to override a parent's decision even when that parent's decision is arbitrary and neither serves nor is motivated by the best interests of the child. Roth, *supra* at 224 (emphasis added).

Roth states that the only level of emotional harm that could justify court intervention is one that is akin to the level of harm that would allow the state to assume custody under General Statutes §§ 46b-120 and 46b-129 — namely, that the child is "neglected, uncared-for or dependent."

Similarly, in Neal v. Lee, 14 P.3d 547 (2000), the Oklahoma Supreme Court held that, in light of Troxel, it was error for the trial court to grant grandparent visitation over the objections of the children's parents when there was no showing of harm in the absence of visitation or that the parents were unfit. See Santi v. Santi, 633 N.W.2d 312 (2001)(Iowa Supreme Court ruled grandparent visitation statute was unconstitutional where the right of parents to raise their children as they saw fit was a fundamental right, and the statute did not offer a compelling reason to override that right); Herbst v Swan, Court of Appeal, California, Second Appellate District,

Division Four, 2002 Cal. App. LEXIS 4736 (Oct. 3, 2002)(statute unconstitutional as applied; insufficient deference to fit parents).

In Belair v. Drew, 776 So. 2d 1105, 1107 (2001), Florida's Fifth District Court of Appeal briefly discussed Troxel and held that Florida's grandparent visitation statute, F.S.A.752.01(1)(b), is facially unconstitutional under the privacy rights protected by Florida's Constitution. Given the Florida Supreme Court's ruling in Saul v. Brunetti, 753 So. 2d 26 (Fla. 2000), declaring unconstitutional 752.01(1)(d), concerning grandparent visitation where the minor child is born out of wedlock, Von Eiff v. Azicri, 720 So. 2d 510 (Fla. 1998), declaring unconstitutional 752.01(1)(a), concerning grandparent visitation where one or both parents are deceased, and Beagle v. Beagle, 678 So. 2d 1271 (Fla. 1996), declaring facially unconstitutional 752.01(1)(e), concerning grandparent visitation where a minor child is living with both natural parents, the decision is consistent.

In Clark v. Wade, 544 S.E.2d 99 (2001), the Georgia Supreme Court redefined the best interest of child standard in third party custody statute as meaning that a third-party had to prove by clear and convincing evidence that a child would suffer harm if custody was awarded to parent. See also State ex rel. Satchfield v. Guillot, 820 So.2d 1255 (2002) (grant of specific visitation rights to grandparents was reversed where evidence presented was insufficient to reach statutorily required threshold of "extraordinary circumstances" and trial court substituted its judgment for that of child's parents).

In Blixt v. Blixt, 774 N.E.2d 1052 (2002), the Massachusetts Supreme Court held that to succeed, the grandparents must allege and prove that the failure to grant visitation will cause the ***child significant harm by adversely affecting the child's health, safety, or welfare.*** See Department of Social & Rehabilitation Services v. Paillet, 16 P.3d 962, 971 (Kan. 2001),

(Kansas Supreme Court holding Kansas statute unconstitutional as applied where statute allowed the court to presume grandparent visitation would be in the best interests of the child); *Cf* Rideout v. Riendeau, 761 A.2d 291 (2000)(Maine statute narrowly tailored and state had compelling interest in providing certain grandparents a forum to seek contact with *child for whom they had cared for as parents*). The Maine statute has more stringent requirements than Michigan's and the Maine Supreme Court read their statute narrowly – finding that grandparents must first show that they cared for the child as parents; only then does the act serve a compelling state interest.[8] The Court stated that "[the best interest] standard delegates to judges authority to apply their own personal and essentially unreviewable lifestyle preferences to resolving each dispute." Rideout v. Riendeau, *supra*.

[8] "We conclude therefore that where the grandparents have acted as the children's parents for significant periods of time, the Grandparents Visitation Act serves a compelling state interest in addressing the children's relationship with the people who have cared for them as parents. Because the Act is narrowly tailored to serve that compelling interest, it may be applied in this case without violating the constitutional rights of the parents." *Id.* at 303. This "standing" requirement is akin to applying a harm standard. Once such a relationship has been proved, the issue of harm become more apparent.

II. THE EFFECT OF MICHIGAN'S GRANDPARENTING STATUTE IS THE SAME AS THE STATUTE CONDEMNED IN TROXEL – PROVIDING NO OBJECTIVE GUIDANCE AND ALLOWING THE STATE TO INSERT ITS JUDGMENT AS TO WHAT IS "BETTER" BASED ON A "FREE-RANGING" BEST INTERESTS TEST.

1. Michigan's Expansive Grant to Seek Visitation

MCL 722.27b states that "[e]xcept as provided in this subsection, a grandparent of the child may seek an order for grandparenting time in the manner set forth in this section only if a child custody with respect to that child is pending before the court.[9] MCL 722.27b(3) provides that grandparenting time will be awarded based on a best interest standard.

A related provision, MCL §722.27, indicates that a court may award visitation to the parties, "maternal or paternal grandparents, or ... others." Sec. 27(1) & 1(b) read:

> 1) If a child custody dispute has been submitted to the circuit court as an original action under this act or has arisen incidentally from another action in the circuit court or an order or judgment of the circuit court, for the best interests of the child the court may do 1 or more of the following:
>
> ***
>
> b) Provide for reasonable parenting time of the child by the parties involved, by the maternal or paternal grandparents, or by others, by general or specific terms and conditions. Parenting time of the child by the parties is governed by section 7a. (Emphasis added).

Sec. 27(1)(b), which covers the apparent scope of court authority, appears expansive – allowing a court to grant visitation to parties, grandparents, and "others." However, Section 27(1)(b) must be read reasonably and Constitutionally, in that courts may award visitation only subject to Constitutional constraint. Under Troxel, a court cannot have unfettered discretion to substitute its judgment for that of fit parents based simply on decisions as to what is better based

[9] Sec. 27b(1) further provides that grandparents may ***initiate*** a visitation action concerning a grandchild only if their own child has died, which is not the Derose situation. However, as discussed in this brief, permitting grandparents to seek visitation if their child has died, with no further limitations, also fails under Troxel.

on a best interest test, in the complete absence of any allegations or findings of parental unfitness. 530 US at 68-69. Further, a court only has authority over those who are properly before it based on principles of standing and substantive right.[10]

2. Best interest tests amount to substitution of judgment in third person visitation cases

The Michigan statutory provisions differ in no significant way from the Washington statute and provide no real objective criteria for determining these cases or when a fit parent's decision should be overridden. Citing Troxel, the Derose decision emphasizes the fundamental right of parents to rear their children, noting that Washington's statute was "breathtakingly broad" and contained no requirement that the court accord the parent's decision any presumption of validity or weight. In comparing Michigan's grandparenting provision, Derose found that under the Michigan statute, a judge is still ultimately authorized to issue a visitation order whenever the judge "deems it to be in the best interests of the child."

> "Indeed the Michigan statute ***mandates*** the trial judge to issue such an order once the judge finds that grandparent visitation would be in the best interest of the child." (Emphasis added).

This is simply tantamount to a trial court substituting its judgment of what would be a "better," without giving any appropriate weight to the Constitutionally protected parent-child relationship. See Herbst v Swan, *supra,* Court of Appeal, California, Second Appellate District, Division Four, October 3, 2002 Cal. App. LEXIS 4736(visitation statute unconstitutional; need

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[10] See In re Clausen, supra, citing to Bowie v Arder, 441 Mich 23, 42-45,46, 490 NW2d (1992). Standing to assert a claim requires more than a personal stake or emotional attachment to a child; standing requires a substantive legal right premised on statute or law that specifically applies to the person asserting the claim. As found in Bowie "neither the Child Custody Act nor any other authority of which we are aware gives a third party a right to legal custody of a child because the child resides with the third party." 441 Mich at 45. See also Terry v Affum, 460 Mich 856 (1999)(remanding to adequately address whether third person visitation would ever be appropriate under MCL 722.27(1)(b)). On remand, the Court of Appeals apparently reads

for some objective criteria). See Issue I, discussion of inadequacy of best interest standard as substantive protection.

The Court of Appeals in this case properly concluded that, while the Michigan statute appears narrower than Washington's in terms of standing to file a visitation action, the Michigan statute is not narrower once a petition is before a court, which is the fundamental consideration. "Simply put, if a judge in Washington cannot constitutionally be vested with the discretion to grant visitation to a nonparent based upon a finding that it is in the child's best interests to do so, then a judge in Michigan cannot be obligated under statute to do the same." Id. The same lack of guidance exists in the Michigan statute as in the Washington statute.

Simply put, a parent makes decisions in a child's best interest. Then, a judge makes a decision that he or she believes is in the child's best interest. The judge's decision may or may not coincide with the parent's, but in any event, the judge's decision always controls. A judge may come into a proceeding "presuming" a parent made a correct decision, however, the judge then still makes his own decision. The presumption has absolutely no effect. Such cases are essentially parent versus judge. The judge has no substantive right – only the showing of harm or unfitness constitutes the compelling state interest that gives the judge the right to override a parental decision. See Santi v Santi, *supra.* The best interest standard contains no real deference to anyone's decision and the decision of the controlling trier of fact will always prevail and always act as a substitution of judgment.

3. A reference to grandparents is in and of itself meaningless.

Grandparents, as with any third person, have no inherent rights to custody or visitation. See Troxel; Frame v Nehls, supra, (grandparents are not a protected class and grandparent

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sweeping authority to a court to grant visitation, contravening Troxel. After remand, Terry was not taken up again to this Court.

visitation is not a protected interest); Victor, Robbins & Bassett, Statutory Review of Third Party Rights, *supra*. Without further delineation, referencing "grandparents" has no legal or practical significance. A generalized belief that a grandparent can be important in a child's life does not constitute a compelling state interest sufficient to override fundamental parental decisions concerning a child's associations. See Lulay, *supra*; Rideout, *supra*.

As stated in Roth v Weston, *supra*, mere reference to "grandparents" does not necessarily have any significance to a child, nor is it pertinent to the protection of fit parental decisions:

> Therefore, we acknowledge that a person other than a blood relation may have established a more significant connection with a child than the one established with a grandparent or some other relative. Conversely, we recognize that being a blood relation of a child does not always translate into that relative having significant emotional ties with that child. Indeed, as § 46B-59 implicitly recognizes, it is not necessarily the biological aspect of the relationship that provides the basis for a legally cognizable interest. Rather, it is the nature of the relationship that determines standing.
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> Consequently, we conclude that, in light of the presumption of parental fitness under Troxel, parents should not be faced with unjustified intrusions into their decision-making in the absence of specific allegations and proof of a relationship of the type contemplated herein.

Roth required proof of a parental-like relationship in addition to a more stringent harm standard. Simply referencing grandparents was meaningless.

4. A Pending Action "Requirement" Offers no Constitutional Protection

Requiring a "pending" child custody "dispute" before a court may authorize third-person visitation is superficial at best and also offers no protection of the parent-child liberty interest. As discussed, MCL §722.27b(1) provides that grandparents can intervene and seek visitation with their grandchildren "if a child custody dispute with respect to that child is pending before the court." (emphasis added).

Section 27b(2) defines the term "child custody dispute" as a proceeding where 1) the marriage of the child's parents is declared invalid or is dissolved by the court, or a court enters a

decree of legal separation; or 2) legal custody is given to a party other than the child's parent or the child is not residing in a parent's home.

While §7b(2) defines "child custody dispute," it does not define "pending." This Court has never ruled specifically on what constitutes a "pending" dispute under the Child Custody Act for purposes of the grandparent visitation statute. [11] In Hessbrook v Nazario, Court of Appeals No. 207350 (unpublished, July 10, 1998), that court found that there was no "pending custody dispute" for purposes of child custody once a judgment has been entered. As analyzed in Hessbrook:

> "Although the trial court continued to have jurisdiction over the children until the children reached the age of majority, the initial divorce proceeding concluded with the entry of the judgment of divorce. The initial divorce proceeding did not create an ongoing custody dispute in which the third party could intervene at any time until the youngest child reached the age of majority. Id. at page 2.

The Hessbrook court concluded that "rather, any subsequent custody dispute would commence with one of the parents filing a petition for a change of custody." Id at page 4, ft. 2. Although unpublished, Hessbrook is highly instructive.

In contrast, the Court of Appeals in Brown v Brown, 192 Mich App 44, 45, 480 NW2d 292 (1991), found standing for grandparent visitation based on entry of a final divorce judgment resolving custody issues. The rule of Brown (final judgment constitutes a "pending" custody dispute) does not logically address the issue of what is actually "pending" before the court. Additionally, in each of the Brown- type cases, child custody appears to have been actually in dispute at some point in the case. See e.g. Olepa v Olepa, 151 Mich App 690, 391 NW2d 446

[11] In Frames v Nehls, this Court discussed section 2 of the grandparenting statute as to what constitutes a child custody dispute in these visitation cases. Frames did not reach a definition of what is a "pending" dispute for purposes of section 1. The Frames plaintiff could not even meet the definition of child custody dispute, the case never addressed the issue of what constitutes a "pending" case.

(1986) (pending post-judgment custody dispute where parties had contested custody and appealed earlier custody decision).

In Derose there is no "pending" custody dispute. Indeed, there was never any actual dispute. A default Judgment of Divorce was entered, giving Appellee full physical and legal custody. Appellant's son was in prison for the criminal sexual assault and did not contest custody.

The uncertainty over what is a "pending" dispute only adds to the lack of clarity and guidance in the visitation provisions.

The Washington statute before the United States Supreme Court also referenced pending actions, however, this was of no import in the Supreme Court's constitutional analysis relating to parental unfitness or the inappropriateness of the state injecting its own judgment. The Connecticut Supreme Court in Roth, supra, rejected that idea that a pending action in anyway offers protection:

> In Castagno, we incorporated a threshold jurisdictional requirement into § 46b-59 that would permit the trial court to entertain a petition for visitation only when the family life of the minor child had been disrupted either by state intervention analogous to the situations included within §§ 46b-56 and 46b-57 or "in a manner similar to that addressed by §§ 46b-56 and 46b-57, but in which the courts have not yet become involved." Castagno v. Wholean, supra, 239 Conn. 350. Although this court's interpretation of § 46b-59 was firmly rooted in the legislative history, and was not merely "a strained attempt to salvage an obviously unsalvageable statutory scheme"; Shawmut Bank, N.A. v. Valley Farms, 222 Conn. 361, 369-70, 610 A.2d 652, cert. dismissed, 505 U.S. 1247, 113 S.Ct. 28, 120 L.Ed.2d 952 (1992); we are now constrained to conclude that our attempt was imperfect. Roth, 259 Conn. at. 216.

The fact that there was already judicial intervention in this case at one time (when Appellee filed for divorce after the molestation of her daughter), doesn't mitigate the intrusion of third person visitation. Divorcing parents are not unfit or less capable of making associational decisions on the behalf of their children. Constitutional protections are not limited to two parent

families. Rust v Rust, 846 SW2d 52, 56 (Tenn. Ct. App 1993)(single-parent family unit entitled to similar measure of constitutional protection against unwarranted governmental intrusion as accorded intact two-parent family). See also Wickham, *supra* ("[w]e, therefore, reject any argument that single parents are entitled to less constitutional liberty in decisions concerning the care, custody, and control of their children").

As Troxel recognizes, the burden of litigating a domestic relations proceeding can itself be "so disruptive of the parent-child relationship that the constitutional right of a custodial parent to make certain basic determinations for the child's welfare becomes implicated."

> In this case, the litigation costs incurred by Granville on her trip through the Washington court system and to this Court are without a doubt already substantial. As we have explained, it is apparent that the entry of the visitation order in this case violated the Constitution. We should say so now, without forcing the parties into additional litigation that would further burden Granville's parental right. We therefore hold that the application of § 26.10.160(3) to Granville and her family violated her due process right to make decisions concerning the care, custody, and control of her daughters. Plurality Opinion, pg. 75.

Allowing a court to grant visitation based simply on the existence of pending action provides no limitation on the court's authority and amounts to a sweeping invitation to intervene.

5. Clear and convincing evidence level of proof insufficient

Appellant argues that under the recent case of Heltzel v Heltzel, 248 Mich App 1 (2001), to satisfy Troxel, third party petitioners need only show "by clear and convincing evidence" that visitation is in the best interest of children.

First, the Heltzel decision relies on Sec. 25(1) of the Child Custody Act in applying clear and convincing evidence as the protection of the parent-child liberty interest. Sec. 25(1) of the Child Custody Act provides that:

> "If a child custody dispute is between the parents, between agencies, or between third persons, the best interests of the child control. If the child custody dispute is

> between the parent or parents and an agency or a third person, the court shall presume that the best interests of the child are served by awarding custody to the parent or parents, unless the contrary is established by clear and convincing evidence."

By its precise language, Sec. 25(1) applies only to custody determinations/disputes. This case involves visitation, not a request for custody.

Indeed, Sec. 25(1) was specifically amended in 1993 to specify "custody" disputes only. Prior to 1993, the statute referred simply to "disputes," although it always referred to awarding only custody in the second line, not visitation. The 1993 amendment narrowed the provision. "When parsing a statute, we presume that every word is used for a purpose." Pohutski v City of Allen Park, 465 Mich 675, 684, 641 NW2d 219 (2002). The provision always envisioned custody:

> "We have long and repeatedly held that, when a legislative amendment is enacted, soon after a controversy arises regarding a meaning of an act, 'it is logical to regard the amendment as a legislative interpretation of the original act." Adrian School District v MPSERS, 458 Mich 326, 337, 582 NW2d 767 (1998).

Thus, Appellant is without basis for even suggesting that Sec. 25(1) applies to visitation. Appellant's citation to Stevenson v Stevenson, 74 Mich App 656 (1977) is unavailing. Stevenson simply states that the act includes visitation provisions, but certainly does not list Sec. 25 as one of them. The sections listed in Stevenson, (Secs. 24 and 27) specifically reference visitation. *Id.* at 659. Sec. 27(b)(3) specifically provides that grandparent visitation actions will be based on a best interests factors, listed in MCL 722.23, but does not reference Sec. 25.[12]

Further, the Heltzel court's ruling that "clear and convincing evidence" is a *substantive* test is clear legal error. In re Martin, 450 Mich 204, 219, n. 12, 538 NW2d 399 (1995), this Court held

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[12] .Unlike 722.25(1), which repeatedly refers to "custody" and "custody decisions" (three times), 722.23 does not restrict its application to custody awards or decisions---

> "Sec. 3. As used in this act, "best interests of the child" means the sum total of the following factors to be considered, evaluated, and determined by the court: " . . . .

that "contrary to a growing misconception ... we view the clear and convincing standard not as a decision-making standard, but as an evidentiary standard of proof that applies to all decisions..." (Emphasis added).

For example, clear and convincing evidence is *not* the substantive standard used to terminate parental rights. There must be "clear and convincing evidence of one of the statutory grounds of unfitness. "In order to terminate parental rights, the trial court must find that at least one of the statutory grounds for termination in MCL 712A.19b(3) has been met by clear and convincing evidence." In re McIntyre, 192 Mich App 47, 50 48 NW2d 293 (1993). These statutory grounds defining unfitness in abuse and neglect cases are the substantive standard; clear and convincing evidence is merely the level of proof required for deciding the substantive unfitness standard.

The Heltzel decision simply leaves best interests as the substantive test for determining third party claims, which is insufficient to protect the fundamental parent-child liberty interest under Troxel, which amounts to insertion of a state judgment based on a trial court's nebulous notions of what is "best." Troxel, 530 US at 65-66. See e.g. Woodfin v Bentley, 596 So2d 918 (S Ct. Alabama 1992)(showing of parental unfitness is required in custody case between parent and third party custodian to overcome parental presumption and returning child to mother in absence of unfitness).

Appellant argues that applying Heltzel's "clear and convincing" level of proof constitutes sufficient deference to fit parental decisions and constitutes the protection that was missing from the Illinois statute found facially unconstitutional in Wickham. The Illinois court, however, found a best interest test in this context amounted to an unfettered insertion of a value judgment. Applying a "clear and convincing" level of proof would not substantively change what the

Wickham court called state "micromanaging" of protected parental decisions in third-person visitation cases.[13]

Heltzel superficially interprets Sec. 25(1) of the Child Custody Act in finding the clear and convincing burden of proof applicable as an evidentiary standard in cases pitting parents against third persons. Assuming *arguendo* that Sec. 25(1) would apply to visitation cases (although specifically written for custody), it must be construed under the Constitution and consistent with Troxel.

The provision contains two separate sentences that clearly delineate between parent versus parent disputes, and parent versus third party disputes. The specific language of the first sentence provides that a best interests test is applicable to child custody disputes "between" parents, "between" agencies, ***or*** "between" third persons. A best interests test has historically been applied between parents because each parent is on equal Constitutional footing with respect to the other parent, and a comparative best interests test balances their like interests. Similarly, in situations where the child custody dispute does not involve a parent, (thus there is no parent-child liberty interest to be protected) and is between two non-parents, a best interests test is also appropriate. Section 25 explicitly recognizes that a best interests comparative test applies to agency versus agency and to third person versus third person disputes. In these two situations, these non-parent parties have comparable levels of interest concerning the child.

In contrast, the second sentence of Section 25 provides that when a dispute is between a parent and an agency, or between a parent and a third person, a different rule applies. The second sentence of the provision incorporates the Constitutionally based presumption that custody with a

[13] This is quite different from the state deciding between two parents on a best interest basis. There, each parent has the same rights as the other, the state must decide between the two, and "deference" to either party's parental rights is not necessary because they both are on equal footing.

parent is in the best interest of a child. The Legislature has recognized the fundamental interest that exists between parent and child and requires that a court must first establish ***the contrary of the premise*** before parents can lose their liberty interest to a third person. The question then remains by what standard is the *contrary* established?

In Roth, the Connecticut Supreme Court found that a strong substantive standard (harm) was necessary, and that it must be proved by clear and convincing evidence. Clear and convincing evidence enhances the harm standard that was read into the statute by the court, but does not substitute for a substantive standard.

> Unlike with a petition by the department of children and families alleging abuse or neglect; General Statutes § 46b-129; "there is no real barrier to prevent a [party], who has more time and money than the child's parents, from petitioning the court for visitation rights. A parent who does not have the up-front out-of-pocket expense to defend against the . . . petition may have to bow under the pressure even if the parent honestly believes it is not in the best interest of the child." (Internal quotation marks omitted.) Rideout v. Riendeau, supra, 761 A.2d 310 (Alexander, J., dissenting). The prospect of competent parents potentially getting caught up in the crossfire of lawsuits by relatives and other interested parties demanding visitation is too real a threat to be tolerated in the absence of protection afforded through a stricter burden of proof. Therefore, pursuant to this court's inherent supervisory powers; see State v. Santiago, supra, 245 Conn. 333-34; State v. Coleman, 242 Conn. 523, 540-42, 700 A.2d 14 (1997); State v. Pouncey, supra, 241 Conn. 812-13; **we determine that a nonparent petitioning for visitation pursuant to § 46b-59 must prove the requisite relationship and harm, as we have previously articulated, by clear and convincing evidence.** *Id.*, 259 Conn. at 232 (Emphasis added).

Under the Troxel analysis, the contrary is established only by finding that a parent is unfit or otherwise incapable of making decisions for their child, or there is a showing of significant harm. See Troxel at 65-67 (discussing long line of cases outlining parent-child liberty interest), 68 (so long as a parent is fit, state does not inject itself into the private realm of the family)[14]; Clausen, *supra* (only finding of unfitness can disturb mutual parent-child liberty interest);

[14] Historically, the primary protection of the parent-child liberty interest is that parent custody, including decision making, may not be disturbed absent a showing that the parent is unfit. See Parham v JR, 442 US 584 (1979); Stanley v Illinois, 405 US 645, 651 (1972).

Wickham; Santi (substantive standard must be harm/unfitness as compelling state interest). Troxel found the visitation impermissibly broad because the Washington statute allowed the court to insert its judgment based on a best interests standard resulting in an improper substitution of judgment.[15] Troxel, with its repeated references to parental fitness, focused on the substantive standard used to justify state intervention into a fundamental right.

Read consistently with Troxel, a finding of unfitness or significant harm must be established by clear and convincing evidence under Sec. 25, again, assuming *arguendo*, it applies to the grandparenting statute at all.

6. Conclusion: Statute Facially Unconstitutional

In this case, the application of a best interests test is the same broad standard that was outright rejected by the Troxel court. Application of a best interest standard is per se impermissible.[16] As in Wickham, Michigan's grandparenting provision unconstitutionally puts parents and third persons on equal footing. The Court of Appeals concluded that "[i]t is precisely th[e] lack of legislative guidance" that renders the statute untenable.

If the Court decides to go beyond rejecting the statute as unconstitutionally broad, it may read into the statute the harm standard necessary to comply with the Troxel analysis. The grandparenting provisions were enacted pre-Troxel. There could presumably be a third-person visitation statute that passes Constitutional scrutiny. Cases involving state intrusion into a fundamental right such as parental choices on child rearing are subject to a strict scrutiny

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[15] Troxel also criticized the provision allowing "any person" to intervene. Id. at 67 (italicizing and emphasizing "best interests of the child" and "any person"). Michigan likewise broadly allows the court to grant visitation to "others" (comparable to "any person") under Sec. 722.27(1)(b). However, it is the substantive standard that is fundamentally important. The substantive standard is the basis for the state's intervention into the liberty interest.

analysis and require a compelling state interest. Santosky v Kramer, 455 US 745, 753 (1972); Washington v Gluckberg, 521 US 702, 721 (1997). A generalized interest in grandparent relationships does not amount to the level of a state's compelling interest in ensuring child safety. See Lulay (distinguishing state interests). In cases, however, where there is parental unfitness or incapacity to make decisions in the best interest of a child or some significant showing of harm in the absence of visitation, the State interest may rise to the level necessary to overcome the parent-child liberty interest. Such a stringent standard ultimately focuses on the fundamental needs of the child, and prevents unnecessary litigation.

In summary, the Constitution's due process clause forbids the government to infringe on fundamental liberty interests, unless the infringement is narrowly tailored to serve a compelling state interest. In Troxel, the United States Supreme Court held the Washington statute unconstitutional because it did not base grandparent visitation on a threshold determination sufficient to justify the State's interference with the parent's fundamental right to make decisions concerning the rearing of her children. The crux of Troxel is not who has the burden of proof or what is the level of proof required, but the substantive standard to determine when the State can intervene and superimpose its own decisions relating to the raising of one's children. As discussed in Issue II, *infra*, Michigan's grandparent visitation statute suffers from the same overbreadth as the Washington statute -- it does not require any showing of a compelling reason, or compelling state interest to interfere with the parent's decision, but allows a trial court to override a parent's decision regarding the child's best interests based simply on the judge's own determination of the child's best interests.

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[16] Additionally, the trial court clearly did not give any deference to Ms. Seymour's decision as a parent in denying visitation and substituted its judgment wholesale, noting that Ms. Seymour was overreacting in her concern for her older daughter, who had been the victim of the sexual assault.

III. THIRD PARTY INTERVENTION CREATES FUNDAMENTAL BURDENS ON ALL FIT PARENTS AND THEIR CHILDREN

Third party intrusion into families headed by fit parents creates significant, unwarranted burdens for those families. The result requested by the Appellants will create significant problems for children and their fit parents, particularly vulnerable families facing poverty and those seeking to permanently leave a violent home.

1. Interference into fit families creates instability for children

There is no question that the very fact of litigation polarizes the parties and leaves the child somewhere in the middle. No matter how hard the system may try to convey a "best interest" message, the real message to the child is that there is no stability and certainty in the child's world and the child cannot and/or should not look to his or her own fit parent for guidance. Third persons, and the court, are substituted in as additional parental figures with the potential of playing each off the other. Children are placed in the untenable position between loved parents and third persons. This subjects a child to a form of psychological warfare:

> Grandparent visitation disputes expose children to all the long and short term stresses of divided loyalty that come with family-law conflicts between parents. Not only do children encounter loyalty conflicts at the time of the dispute, but also they are likely to face long-term loyalty conflicts if a visitation order is granted." Sykora, Theresa, "Grandparent Visitation Statutes: Are the Best Interest of the Grandparent Being Met Before Those of the Child?, 30 Family Law Quarterly 753, 761 (Fall 1996).

Grandparent visitation sounds innocuous – to be opposed to "grandparents" automatically makes one sound emotionally cold at best. However, grandparent visitation raises a number of fundamental concerns:

> Although many grandparents might ideally like more involvement with their grandchildren, very few grandparents will ever go to court against their own children to seek visitation. While grandparent visitation sounds innocent and even desirable, the reality is that the vast majority of grandparent visitation cases involve dysfunctional and high conflict families. Giving them visitation is likely to only put more stress on the children. Rather than encouraging such claims, we should be highly suspicious of them. Zorza, J. "*PKPA Amendment Requires Involvement of Grandparents in All Custody Disputes*," Domestic Violence Report, Vol. 4 No. 4 p. 61-62 (April/May 1999).

The instant case illustrates how a "typical" grandparent visitation lawsuit often presents itself. The father is a self-confessed child abuser of his stepdaughter, who created a nightmare for his wife and child and who is now incarcerated and will continue to be for the next 20 years. His mother, the paternal grandmother of the child involved in this case, fails and/or refuses to acknowledge her son's crime, and yet expects to be a healthy part of the family's life. Ordering the child's mother to permit association with the abuse-denying grandmother undermines the mother's authority and judgment about what is healthy for her own child, and sends the child the message that, "not everyone believes your mother's position on the abuse, and that's ok." Parents and children should not be placed in this difficult position of litigating against each other.[17]

When a court orders visitation that parents do not welcome, "ill feelings, bitterness and animosity" between the parents and grandparent may intensify. Strouse v Olsen, 397 NW2d

[17] Pitting a child against a fit parent violates the mutual parent-child liberty interest. A family is not just the sum of its parts: a mother, father, sister, brother. Likewise, a family is not an arena for the competing "liberty interest" of each family member to be "happy" individually. Families are dynamic relationships that change with time and circumstance. At one moment, family members' happiness may be subordinated to the welfare of a sick child, or an unemployed father, or a mother who is finishing law school, or a brother who has yet to immigrate to this country. At another moment, a family may share their happiness in welcoming a new baby, a promotion, or a birthday.

651, 655 (S D. 1986). A court order will not serve the best interest of a child if it forces the child into an environment consisting of hostile and conflicting authority figures. Id.

Any third party litigation exposes parents (and consequently the children in the household) to arduous, and emotionally and financially draining court proceedings. Families would be litigating the fundamentally personal, private and subjective decisions concerning association for their child.[18]

Wide discretion under the best interest factors raises the specter of cultural, class, life-style and other types of bias and prejudice. The very subtle ramifications of social bias often invade custody and visitation decisions. Poorer, less educated parents will always look worse in relation to older, seemingly more established and settled grandparents, who often have significantly more resources. Social bias against fit, but single, parents will also affect decision makers.[19]

Various factual situations can always arise which will appeal to our emotions. These emotional considerations, however, present inherent dangers and should never trump the very fundamental rights of association, privacy, and liberty between fit parent and child. Well-intentioned, yet highly subjective concerns will lead to a slippery slope of other, seemingly

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[18] There are numerous practical problems with such litigation. For example, if the "relationships" of a two-year-old child are at issue, whose interests and rights are truly at stake. The child cannot express a preference. Is a guardian ad litem then appointed for the child to make a recommendation based on the best interest factors concerning the significant relationship? Who pays for the guardian ad litem? Must a young family, who should be saving for a child's future, spend their money for their own attorney, court costs, and the costs of a guardian, as well as for various [costly] experts.

[19] A fit parent is a fit parent. Single and divorced parents should not be faced with different treatment than fit parents in two-parent households. See Rust, supra ; Frame v Nehls, *supra,* 452 Mich 171, 550 NW2d 739 (1996) (paternity cases involving unmarried parents, finding that grandparents, compared to parents (including single parents), have no fundamental right to a relationship with the child, thus grandparents cannot argue equal protection).

innocuous interventions of the parent-child relationship. The result is confusion and uncertainty, which ultimately works to the detriment of the child.

"Courts are not free to take children from parents simply by deciding that another home offers more advantages." In the Matter of Burney, 259 NW2d 322, 324 (Iowa, 1977). Although visitation is not an award of custody, it is a removal of children from the care and control of their fit parents based on consideration of the "advantages" of a third person over a parent. Custody, care, and control comprise all of what we call "parental rights." Franz v United States, 707 F. 2d 582, 602 (D.C. Cir. 1983). Families are entitled to the reciprocity of both rights and responsibility.

> Even assuming that the parent makes a mistake in denying the child the right to see the grandparent, the fundamental right of parents to make decisions concerning their children must include the right to make wrong decisions. For the state to delegate to the parents the authority to raise the child as the parents see fit, except when the state thinks another choice would be better, is to give the parents no authority at all. Sykora, 30 Family Law Quarterly at 762.

2. Third party cases disproportionately impact low-income and single-parent households, which are predominently headed by women

Most low-income families consist of single parent households. Women head the majority of these single parent households.[20] These are the families who most often seek support outside of the nuclear family, necessitated by an emergency, illness, homelessness, domestic violence, loss of employment, as well as job demands, military service, or school. Parents should always be encouraged to do what is in the best interest of their children, including temporary placement

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[20] Symposium: Children, Divorce, and the Legal System: The Direction for Reform, 19 Columbia Journal Law and Social Problems 105, 115 (1985), citing House Select Committee on Child Abuse and Families: Current conditions and recent trends, Congress 1st Session 15 (1983). See also Weitzman, The Economics of Divorce: Social and Economic Consequences of Poverty, Alimony and Child support Awards, 28 UCLA Law Review 1181, 1241, 1249 (1981); Bruch and Wikler, Factors Figuring to Postdivorce Poverty, 63 Mich Bar Journal 472, 477 (June 1984).

outside the home. Parents should not be punished for taking steps that are best for their children. They should not fear that permitting their child to develop a positive relationship with a grandparent or supportive neighbor (or in the alternative, limiting a relationship) will subject them to expensive litigation as the state permits increased third-person intrusions into the family, allegedly for the "best interests" of the child.

Low-income families are disproportionately disadvantaged when litigating against third parties who have more money and resources to sustain long and expensive actions. As the system currently stands, a financially strapped party (usually a single mother) is overwhelmed by the prospect of a lawsuit. In visitation matters, there is no appointed counsel. There is nothing to equalize even partially the economic discrepancy between the lower income parent and the often higher income third party, and, contrasted to disputes between parents, there is often no ability of the court to enter child support orders or to order transfer of other items of economic value in order to equalize the two competing households financially. Often the simple filing of a lawsuit will result in a stipulated order for visitation because the lower income parent cannot pay an attorney.

This potential for creating financial chaos in a family was specifically articulated by Justice Kennedy in his dissenting opinion in Troxel, *supra*:

> It must be recognized, of course, that a domestic relations proceeding in and of itself can constitute state intervention that is so disruptive of the parent-child relationship that the constitutional right of a custodial parent to make certain basic determinations for the child's welfare becomes implicated. The best interests of the child standard has at times been criticized as indeterminate, leading to unpredictable results. See, e.g., American Law Institute, Principles of the Law of Family Dissolut8ion 2, and n.2 (Tent. Draft No. 3, Mar. 20, 1998). If a single parent who is struggling to raise a child is faced with visitation demands from a third party, the attorney's fees alone might destroy her hopes and plans for the child's future. Our system must confront more often the reality that litigation can itself be so disruptive that constitutional protection may be required; and I do not

> discount the possibility that in some instances the best interests of the child standard may provide insufficient protection of the parent-child relationship.

If forced to litigate to preserve parental autonomy, families will be divided into two classes, those who can afford to defend their parenting decisions, and those who will not be able to afford to do so.[21]

3. Third party intrusions create fundamental burdens on parents and children surviving domestic violence

Most significantly, the potential for increased state-authorized third-person intrusions into family decisions has serious implications for those parents leaving an abusive spouse. As of 1992, the United States Surgeon General estimated that from 1.8 to 4 million women were victimized each year by domestic violence.[22] Research suggests that parents who abuse their spouses are also at significantly elevated risk of abusing their children:

> Children from homes where there is parent-on-parent violence are more likely to be physically abused themselves by the battering parent. A random survey of the U.S. population in the early 1980's revealed that 50% of men who battered a partner also severely abused a child more than twice a year, whereas only 7% of non-battering men severely abused a child at the same frequency. One report concludes that children who live in a home where violence occurs between adults are physically abused or seriously neglected at a rate of 1500% greater than that of the general population." (footnotes omitted), Field, Julie Kunce, "But He Never Hit the Kids": Domestic Violence as Family Abuse," Michigan Bar Journal, September 1994, Vol. 73, No. 9, p. 922.

Battered women face daunting hurdles as they seek to establish a home free of violence for themselves and their children. The same financial hardships that keep many survivors of domestic violence from leaving the assailant continue to plague them once they are separated. A

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[21] Custodial parents who deny contact with a controlling or abusive party all too often cannot afford to defend their decision.

custodial mother and her children face many changes as they establish a safe, violence-free household, perhaps starting new schools, moving away from friends, and changing day-care providers.

> "The greater the number of and the more frequent the changes, the greater is the likelihood of emotional and physical illness." Schecter and Edleson, In the Best Interest of Women and Children: A Call for Collaboration Between Child Welfare and Domestic Violence Constituencies, for the conference, Domestic Violence and Child Welfare: Integrating Policy and Practice for Families, Racine Wisconsin, June, 1994, page 13.

The risk of domestic violence is frequently greater after separation or breakup than during the co-habitation or the intimate relationship.

The custody fight itself may be a form of perpetuation of the abuse. "Often, abusers are more interested in trying to continue control and harassment over an ex-partner than in actually obtaining custody of the minor children."[23] "When domestic violence is not taken seriously, and because women are held to a much higher standard than men, abusers wind up with custody."[24]

"All of the gender bias studies have shown that women are already badly disadvantaged in divorce and custody litigation because they are held to a higher standard, seen as less credible, and have fewer financial resources necessary for effective representation. " Zorza, J. "PKPA Amendment Requires Involvement of Grandparents in All Custody Disputes," Domestic Violence Report, Vol. 4 No. 4 (April/May 1999), citing Karen Winner, Divorced from Justice:

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[22] Novell, A., From the Surgeon General, US Public Health Service, 23 J.A.M.A., 267 at 3132 (1992).

[23] Saunders, Daniel, "Child Custody Decisions in Families Experiencing Woman Abuse, 39 Social Work 51 (January 1994); Chesler, P. "Mothers on Trial" The Battle for Children and Custody," Seattle, Seal Press (1987); Walker, L.E. and Edwall, G.E., "Domestic Violence and Determination of Visitation and Custody in Divorce" in Divorce," in D.J. Sonkin (ed.), Domestic Violence on Trial" Psychological and Legal Dimensions of Family Violence, New York, Springer (1987).

The Abuse of Women and Children by Divorce Lawyers and Judges (NY, Regan Books, 1996). In visitation matters, "reasonable visitation is never appropriate for batterers because they are not reasonable and will use the visitation as a license to abuse the visitation and continue to control and abuse their former partners." Field, Id. At 924.

Just as an abusive spouse will continue to litigate custody and visitation matters in order to control the domestic violence survivor, he may use his family to engage in similar tactics. Often, in cases involving domestic abuse, the parents of the abuser will file for visitation, and even custody. Zorza, supra . Although courts may limit contact between the abuser and the custodial mother and children, courts are less aware or savvy when it comes to relatives of the abuser. See Bohl, "The Unprecedented Intrusion: Survey and Analysis of Selected Grandparent Visitation Cases," 49 Okla L Rev. 29 (1996). Courts may feel that children should have contact with the extended paternal family simply because contact with the abuser is limited. This, however, ignores the pervasiveness of abuse. Children will have increased chances of exposure to the abuser without adequate supervision. The tensions between the parties increase, the opportunity for an abuser to control increases, and the children are left in the middle:

> The Model Code [the Family Violence Model State Code developed by the National Council of Juvenile and Family Court Judges] instructs that the court shall consider as primary the safety and well-being of the child and of the parent who is the victim of domestic of family violence, and recommends that supervised visitation be used as an option, with the supervision being done at a visitation center where staff understand domestic violence, child abuse and child development. Family members, including parents of the abusive spouse, are generally not good choices as supervisors, because they may also have been abusive, may not recognize an abuser's potential to seriously hurt the mother or child, or are in fact afraid of their abusive child. Field, Id. at 924.

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[24] J. Zorza, "Using the Law to Protect Battered Women and Their Children," Clearinghouse Review, Vol. 27 n. 12 at 1440.

This philosophy goes hand in hand with the State's compelling interest to protect children from actual harm. The courts' primary duty is to ensure that children are in fit homes, and to ensure the basics of food and shelter. Additionally, implicit under the doctrine of parens patriae is the state's insurance of basic levels of education, truancy standards, and work restrictions concerning children. These all pertain to issues of fundamental fitness. See Troxel. The use of the best interest standard, however, in third-person visitation situations, chips away at this fundamental focus on fitness.

Cultural issues also come into play in domestic violence cases. Women immigrants come to this country, without family, to live with a new husband and his extended family who, in cases involving domestic abuse, often intervene on behalf of their son. Another cultural implication is that in some contexts, deference is owed to one generation over the next. These situations leave open the possibility that some battered immigrant women would not challenge intervention in court if they knew an older generation was intervening, even if it would be best for the child. They would view the situation from the context of their native cultures, not from the context of our Constitution and laws.

Even if third persons, including grandparents or other family members do not have a malicious intent in seeking visitation, they simply may not understand or respect the need of the survivor to reestablish her family without outside interference. Survivors of domestic violence must often leave the jurisdiction or reestablish a safe life for their children away from the abuse. See Field, p. 923. "Maintaining social support for the battered woman and her children through such major life changes is, therefore, critical. The need for supporting the remaining family unit – mother and children – in the aftermath of violence is consistent with current thinking in the area of family preservation." See Schecter and Edelson, supra, p.13.

> "In addition, based on my representation of over 200 battered women and my experience assisting in family law and domestic violence cases throughout the country as the senior attorney for the former National Center on Women and Family Law, maternal grandparents are far less likely to seek visitation than are paternal ones. Paternal grandparents often go to court to back up their sons who are abusive of their partners or the grandchildren. In some of the worst cases, the paternal grandparents have acted to circumvent the courts' denial of visitation to highly dangerous sons. In other cases, both parents, knowing of the abusiveness of one or both grandparents and anxious to protect their children, have opposed the visitation. Because many courts still view grandparent visitation favorably and because child abuse (and especially sexual abuse) claims are very difficult to prove ... and mental health professionals are often afraid or unwilling to report them (American Psychological Association, Violence and the Family: Report of the American Psychological Association Presidential Task Force on Violence and the Family 12 (Washington, DC 1996)), many parents' efforts to protect their children from abusive grandparents are unsuccessful." Zorza, J. "PKPA Amendment Requires Involvement of Grandparents in All Custody Disputes," Domestic Violence Report, Vol. 4 No. 4 , p. 61-62 (April/May 1999).

Battered women and their children will be faced with increasing burdens as the potential for competing adults increases, with petitions from maternal and paternal grandparents, aunts, uncles, or other interested adults. Such litigation could continue throughout a child's minority. See Zorza, Id. at 62 (discussion of effect on battered women of increased number of litigants and loss of confidentiality).

Best interests tests allow for insertion of the subjective value judgments of the trier of fact by emphasizing judicial discretion. The tests are not based on a compelling state interest, by definition, do not limit consideration to more objective fitness standards. As such, it flies in the face of the Constitutional protections of the natural parent-child relationship discussed above. The effects of third-person intervention are even more burdensome for low-income women and survivors of domestic violence who are seldom in a position to defend their family autonomy in protracted litigation.

CONCLUSION

The crux of Appellant's argument is that the State can substitute itself as a parent in fit families and make the individualized day-to-day decisions that go the heart of being a parent. However, as discussed in this brief, the concept of *parens patriae* is not applicable unless parents have acted in a way which falls below certain minimum standards of fitness, creating a situation which causes harm to a child.

The most fundamental right that exists in our society is that fit parents can make decisions concerning their children, including associational decisions, free from intrusion by the State or any third person. Petitioners desire to go far beyond the State ensuring minimal "objective" levels of fitness. They seek a society where the courts second-guess the truly private and subjective decisions made by parents as part of daily life. These decisions include deciding with whom children may associate, the choice of children's religion, and imparting parental views on social and moral issues.

The Michigan statute is unconstitutional on its face impermissibly allowing the state to insert its judgment as to what is "better" based on broad-ranging and subjective best interest comparisons. To fall within the Constitutional analysis in Troxel, the necessary standard and compelling interest would require a showing of sufficient harm to justify overruling a fit parental decision.

RELIEF

Amici request that this Court affirm the Court of Appeals decision in this case.

Respectfully submitted,

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December 28, 2002

State of Michigan
In the Supreme Court
Appeal from the Michigan Court of Appeal

Theresa O'Day DeRose (aka Theresa Seymour)
Plaintiff/ Third Party Defendant-Appellee,
v.

Joseph Allen DeRose,
Defendant-Appellee,
v.

Catherine DeRose,

Third Party Plaintiff-Appellant

Supreme Ct. 121246
Ct. of Appeals. 232780
Trial Court. 97-734836-DM

This Appeal Involves a Ruling that a Provision of The Constitution, a Statute Rule or Regulation or Other State Governmental Action is Invalid

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PROOF OF SERVICE

On the date below I served two copies of the Amicus Curiae brief and the Motion to file the Brief on both Appellant and Appellee by first class mail pursuant to MCR 2.107 addressed to their attorneys above. I declare that the statement above is true to the best of my information, knowledge, and belief.

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December 30, 2002